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3:01-CR-01579 USA V. CUELLAR

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CRMEMOPP.

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SUBMITTED TO THE COURT

DEPUTY

6 Attorneys for Plaintiff
7 United States of America

8
9 UNITED STATES DISTRICT COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,) Criminal Case No. 01CR1579B
12)
Plaintiff,) DATE: JULY 2, 2001
13) TIME: 2:00 p.m.
v.)
14) GOVERNMENT'S MEMORANDUM IN
AIDE CUELLAR,) OPPOSITION TO DEFENDANT'S
15) MOTIONS TO:
(1) DISMISS INDICTMENT
16 Defendant.) (2) COMPEL DISCOVERY
(3) SUPPRESS EVIDENCE
17

18 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through
19 its counsel, PATRICK K. O'TOOLE, United States Attorney, and Scott H.
20 Saham, Assistant United States Attorney, and hereby files the attached
21 memorandum of facts and law in opposition to Defendant's Motions.
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I

STATEMENT OF THE FACTS

On May 7, 2001 Sandra Monica Rocha ("Rocha") and Aide Cuellar ("Defendant") entered the United States at the San Ysidro POE. Rocha was driving a 1989 Jeep Cherokee and Defendant was in the passenger seat. The individuals were asked the purpose of their trip to Mexico and they stated that they were returning from dropping off relatives at the Tijuana air port. According to the registration the vehicle had been purchased on May 3, 2001. The vehicle was referred to secondary and a Narcotics Detector Dog alerted to it. 28 kilograms of marijuana were found inside the back seats of the vehicle. Defendant was advised of her Miranda rights and waived them. Defendant stated that she was going to be paid \$2000 to drive the marijuana into the United States. Rocha was Mirandized and denied knowledge of the marijuana. Rocha was later released.

II

DISCUSSION

A. DEFENDANT'S MOTION TO DISMISS THE INDICTMENT SHOULD BE DENIED

Defendant asks this Court to dismiss the indictment on the ground that the drug statutes under which he was charged are unconstitutional. Defendant's argument is without merit, and his motion to dismiss should therefore be denied.

Defendant claims the statute is unconstitutional based on the Supreme Court's pronouncement in several recent cases that facts, other than prior convictions, that produce an increase in the maximum sentence to which a defendant is subject must be found by a jury beyond a reasonable doubt. See, e.g., Apprendi v. New Jersey, 120 S.Ct. 2348, 2000 WL 807189 (U.S. June 26, 2000); Castillo v. United

1 States; 120 S.Ct. 2090 (2000); Jones v. United States, 119 S.Ct. 1215
 2 (1999). Nothing in those cases, however, mandates defendant's
 3 conclusion that the drug statutes are unconstitutional as written

4 As an initial matter, whatever one may conclude about the
 5 constitutionality of those provisions of the drug statutes that
 6 enhance a defendant's sentence based on the type and quantity of
 7 controlled substance, in the instant case Defendant is alleged to have
 8 imported (and possessed with the intent to distribute) approximately
 9 61.6 pounds of marihuana. Given the allegations of the indictment,
 10 defendant, if convicted, would be subject to punishment under 21
 11 U.S.C. § 841(b)(1)(D), which prescribes a statutory maximum penalty
 12 of five years of imprisonment. That is the lowest statutory penalty
 13 provided for in the statute for possession of marihuana with the
 14 intent to distribute.^{1/} Defendant thus is not subject to having his
 15 maximum statutory sentence enhanced, based on the allegations of the
 16 indictment. The rule announced in Apprendi, that "[O]ther than the
 17 fact of a prior conviction, any fact that increases the penalty for
 18 a crime beyond the prescribed statutory maximum must be submitted to
 19 a jury, and proved beyond a reasonable doubt," Apprendi v. New Jersey,
 20 120 S.Ct. 2348, 2000 WL 807189 *8 (U.S. June 26, 2000), thus has no

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 22
 23 ¹ The Government believes that under the plain language of the
 24 drug statutes, the "base" statutory maximum penalty is twenty years.
 25 See 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(1)(C). Thus the rule of
 26 Apprendi, prohibiting increases in the statutory maximum, absent a
 27 jury finding beyond a reasonable doubt, applies in the drug context
 28 only to cases involving mandatory minimum quantities of drugs. See
 21 U.S.C. §§ 841(b)(1)(A) and (B), 960(b)(1)(A) and (B). The Court
 need not decide this question on the facts of this case, however,
 because Defendant would be subject to the lowest possible sentence
 under the statute in any event. See 21 U.S.C. §§ 841(b)(1)(D) and
 960(b)(1)(D).

1 application to defendant, because the penalty to which he would be
2 subject upon conviction would not be increased in any event.

3 Even if that were not the case, however, defendant's motion still
4 should be denied. The drug statutes do not require that the type and
5 quantity of the controlled substance, the factors that have the
6 potential to increase a defendant's maximum penalty, be found by the
7 judge rather than the jury. Instead the statutes are silent on that
8 point and are thus capable of being interpreted in such a way as to
9 comply with the constitutional mandate as announced in Apprendi,
10 Castillo, and Jones. And it is, of course, a cardinal principle of
11 statutory construction that "[W]here a statute is susceptible of two
12 constructions, by one of which grave and doubtful constitutional
13 questions arise and by the other of which such questions are avoided,
14 [the court's] duty is to adopt the latter." United States ex rel.
15 Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909).
16 Because the drug statutes can reasonably be read to require a jury
17 finding of any fact that would increase a defendant's maximum
18 statutory penalty, they are not facially unconstitutional.

19 This was the conclusion of Judge Jones in deciding a virtually
20 identical motion. As he stated,

21 [T]here is nothing facially defective about §§ 841 or 960.
22 The New Jersey statutory scheme explicitly allowed for a
23 judge to make the finding of animus which triggered the
24 sentencing enhancements. However here, § 841 and § 960 are
25 silent as to the issue of the identity of the fact finder
26 and the required burden of proof. Even if drug quantities
27 are elements of the offense that are required to be charged
28 in the indictment and decided by a jury beyond a reasonable
doubt, it is possible to construe these sections to comply
with this requirement.

United States v. Lomeli-Medrano, no. 00-1290-J (S.D. Cal. July 20,
2000), slip opinion at 9.

1 In sum, the cases cited by defendant have no application here,
2 because defendant's sentence is not subject to any increase above an
3 otherwise-applicable statutory maximum. Even if those cases were
4 applicable, the drug statutes do not on their face violate the rule
5 that a jury must find any fact that would produce an increase in a
6 defendant's statutory maximum sentence. Those statutes are thus
7 constitutional, and defendant's motion to dismiss the indictment
8 should be denied.

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11 B. THE GOVERNMENT NEED ONLY PROVE THAT THE DEFENDANT
12 "KNOWINGLY OR INTENTIONALLY" IMPORTED OR POSSESSED
SOME QUANTITY OF A CONTROLLED SUBSTANCE.

13 Defendant argues that, even if the drug statute itself can be
14 construed in such a way as to survive constitutional scrutiny in the
15 face of Apprendi (a proposition defendant hotly disputes), the statute
16 must then be read to impose a requirement that a defendant know the
17 type and amount of controlled substance that he imported or possessed
18 in order to be found guilty under the "enhanced" offenses under 21
19 U.S.C. §§ 841(b)(1)(A) and (B) and 21 U.S.C. §§ 960(b)(1) and (2).
20 Defendant reasons that because the type and quantity of the controlled
21 substance are now elements of these "enhanced" offenses, there must
22 be a showing that a defendant acted "knowingly or intentionally" with
23 respect to those elements.

24 Defendant's argument is without merit. Although the drug
25 statutes do impose a scienter requirement, i.e., that the defendant
26 "knowingly or intentionally" imported or possessed with the intent to
27 distribute a controlled substance, that requirement is satisfied so
28 long as the defendant knew that he was importing or possessing some

1 quantity of some controlled substance. Neither the language of the
2 statute nor any general principle of criminal law requires that a
3 defendant have knowledge of the precise nature or quantity of the
4 controlled substance.

5 As an initial matter, it should be noted that defendant's
6 assertion that the Government must prove he knew the particular
7 controlled substance involved and its weight is flatly contrary to
8 current Ninth Circuit law. As our court of appeals has unequivocally
9 stated,

10 [A] defendant charged with importing and possessing a
11 controlled substance need not know "the exact nature of the
12 substance with which he was dealing." Instead, a defendant
can be convicted under § 841 and § 960 if he believes he
has some controlled substance in his possession.

13 United States v. Ramirez-Ramirez, 875 F.2d 772, 774 (9th Cir. 1989)
14 (citations omitted) (emphasis in original). Accord: United States v.
15 Salazar, 5 F.3d 445 (9th Cir. 1993) (defendant responsible for "volume
16 of drug actually imported, whether or not defendant knows either the
17 volume or nature of the substance - if he knows only that he is
18 importing a controlled substance"); United States v. Lopez-Martinez,
19 725 F.2d 471 (9th Cir. 1984). There is nothing in Apprendi, or in any
20 general principle of criminal law, that requires a different rule.

21 The Supreme Court has recently reminded us that, absent an
22 unambiguous legislative direction to the contrary, a court should
23 "read into a statute only that mens rea which is necessary to separate
24 wrongful conduct from 'otherwise innocent conduct.'" Carter v. United
25 States, 120 S.Ct. 2159, 2169 (2000) (quoting United States v. X-
26 Citement Video, 513 U.S. 64, 72 (1994)). In the instant case the
27 defendant's knowledge that he was importing (or possessing) some
28 amount of some controlled substance is sufficient to distinguish his

1 behavior from "otherwise innocent conduct," thus ensuring that only
 2 those who act with criminal intent will be punished under the statute.

3 Many statutes impose criminal liability based on a defendant's
 4 knowledge that his conduct was wrongful, even though the defendant was
 5 not aware of the full extent of his wrongful conduct. Courts have
 6 routinely approved the imposition of enhanced penalties on defendants
 7 in such circumstances. As one appellate court has stated,

8 [S]tatutes that enhance penalties for previously defined
 9 offenses when certain aggravating circumstances are
 10 present, whether or not the defendant is aware of the
 11 circumstances, are neither new nor uncommon. Examples
 12 include the "schoolyard statute," 21 U.S.C. § 860, which
 13 enhances the penalty for distribution of drugs when the
 14 sale occurs within 1000 feet of a school, regardless of the
 15 defendant's knowledge of the proximity, see United States
 16 v. Holland, 810 F.2d 1215, 1222-24 (D.C.Cir.) (upholding
 17 same), cert. denied, 481 U.S. 1057, 107 S.Ct. 2199, 95
 18 L.Ed.2d 854 (1987); United States v. Falu, 776 F.2d 46, 50
 19 (2d Cir.1985) (same); 21 U.S.C. § 859, which enhances
 20 the penalty for the distribution of drugs when the
 21 recipient is a minor, regardless of the defendant's
 22 knowledge of his age, see United States v. Pruitt, 763 F.2d
 23 1256, 1261-62 (11th Cir.1985) (upholding same), cert.
 24 denied, 474 U.S. 1084, 106 S.Ct. 856, 88 L.Ed.2d 896
 25 (1986); 18 U.S.C. § 2423, which enhances the penalty for
 26 transportation of an individual for the purpose of
 27 prostitution when the victim is a minor, even if the
 28 defendant is unaware of the victim's age, see United
States v. Hamilton, 456 F.2d 171 (3d Cir.) (upholding
 same), cert. denied, 406 U.S. 947, 92 S.Ct. 2051, 32
 L.Ed.2d 335 (1972); and 21 U.S.C. § 841(b), which
 prescribes elevated penalties for the possession with
 intent to distribute cocaine in crack form, regardless of
 whether the defendant knew the amount or nature of the
 controlled substance, see United States v. Collado-Gomez,
 834 F.2d 280, 281 (2d Cir.1987) (upholding same), cert.
 denied, 485 U.S. 969, 108 S.Ct. 1244, 99 L.Ed.2d 442
 (1988).

24 United States v. Schnell, 982 F.2d 216, 221 (7th Cir. 1992).

25 A recent case from our court of appeals is illustrative. United
 26 States v. Flores-Garcia, 198 F.3d 1119 (9th Cir. 2000), involved a
 27 prosecution under 8 U.S.C. § 1327. That statute makes it a crime to
 28 "knowingly aid[] or assist[] any alien inadmissible under section

1 212(a)(2) [of the Immigration and Nationality Act] (insofar as an
 2 alien inadmissible under such section has been convicted of an
 3 aggravated felony) . . . to enter the United States." The issue
 4 presented in Flores-Garcia was whether the Government had to prove
 5 that the defendant knew of the alien's aggravated felony conviction.
 6 The Ninth Circuit held that such knowledge was not required, that a
 7 conviction could be had if the Government proved that the defendant
 8 had knowingly aided and abetted the entry of the alien, that the
 9 defendant knew the alien was inadmissible, and that the alien was
 10 inadmissible because of an aggravated felony conviction, whether or
 11 not the fact of the aggravated felony conviction was known to the
 12 defendant. 198 F.3d at 1122-1123. As the court explained, the
 13 statute was constitutional so long as the statute required proof that
 14 the defendant was aware that his conduct was illegal.

15 Criminal law presumes that the government must prove that
 16 the defendant possessed some mental state for each
 17 statutory circumstance that would make criminal "otherwise
 18 innocent conduct," even if this construction is not the
 19 "most natural grammatical reading of the statutory
 20 language." United States v. X-Citement Video, Inc., 513
 21 U.S. 64, 72, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994).
 22 Provided the defendant recognizes he is doing something
 23 culpable, however, he need not be aware of the particular
 24 circumstances that result in greater punishment.

25 Id. at 1121-1122.^{2/}

26 ^{2/} The Court of Appeals for the Second Circuit reached the same
 27 conclusion in United States v. Figueroa, 165 F.3d 111 (2d Cir. 1998).
 28 After reviewing numerous Supreme Court decisions on mens rea, that
 court summarized the rule to be followed in determining a statute's
 mens rea requirement as follows:

These Supreme Court cases stand for the proposition that
 absent congressional intent to the contrary, statutes
 defining public welfare offenses should be read to require
 only so much knowledge as is necessary to provide
 defendants with reasonable notification that their actions
 are subject to strict regulation. In such cases, Congress
 is presumed to have placed the burden on defendants who

(continued...)

Another example of the principle that a defendant "need not be aware of the particular circumstances that result in greater punishment" is United States v. Pitts, 908 F.2d 458 (9th Cir. 1990). There the Ninth Circuit upheld former 21 U.S.C. § 845a(a), now codified at 21 U.S.C. § 860(a), which prohibited distribution of narcotics within 1,000 feet of a school. The defendant in Pitts claimed the statute violated the due process clause because it failed to require that the defendant know he was within 1,000 feet of a school. The court had no difficulty rejecting the due process claim, quoting approvingly the Second Circuit's decision in a similar case:

Anyone who violates section 845a(a) knows that distribution of narcotics is illegal, although the violator may not know that the distribution occurred within 1,000 feet of a school. In this respect, the schoolyard statute resembles other federal criminal laws, which provide enhanced penalties or allow conviction for obviously antisocial conduct upon proof of a fact of which the defendant need not be aware.

Pitts, 908 F.2d at 461 (quoting United States v. Falu, 776 F.2d 46, 50 (2d Cir.1985)).

Other cases involving the drug laws reaffirm the conclusion that guilt is not precluded because a defendant was not aware of all the circumstances that expose him to increased punishment. In United States v. Valencia-Roldan, 893 F.2d 1080 (9th Cir. 1990), the Ninth Circuit held that a conviction under 21 U.S.C. § 845b(a) (subsequently recodified as 21 U.S.C. § 861(a)), making it a crime to knowingly and intentionally

employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding

^{2/}(...continued)

have received such notice to "ascertain at [their] peril whether [their conduct] comes within the inhibition of the statute."

Id. at 116-117.

1 detection or apprehension for any [specified drug offense]
 2 by any Federal, State, or local law enforcement official,
 3 did not require that the Government prove the defendant knew that he
 4 was being assisted by a person under eighteen years of age. Id. at
 5 1083.^{3/} Similarly, in United States v. Pruitt, 763 F.2d 1256 (11th
 6 Cir. 1985), the Court of Appeals for the Eleventh Circuit ruled that
 7 a conviction for distributing drugs to a minor did not require proof
 8 that the defendant knew the distributee's age. Id. at 1261-1262.

9 The principle that a defendant who knowingly commits a wrong is
 10 responsible for his actual conduct, regardless of his knowledge of the
 11 full scope of that conduct, is not limited to drug cases. See, e.g.,
 12 United States v. Feola, 420 U.S. 671, 678-679, 684 (1975) (assault on
 13 federal officer statute does not require proof that defendant knew of
 14 victim's status); United States v. International Minerals & Chemical
 15 Corp., 402 U.S. 558, 565 (1971) (defendant transporting sulfuric acid
 16 and hydrofluosilicic acid need not be shown to have known that the
 17 items were subject to regulation); United States v. Freed, 401 U.S.
 18 601, 609 (1971) (defendant prosecuted for possession of unregistered
 19 hand grenades need not know that the hand grenades were unregistered);
 20 Ailsworth v. United States, 448 F.2d 439, 442 (9th Cir. 1971) (in
 21 theft prosecution defendant need not know that stolen property was
 22 valued at greater than \$100); United States v. Howey, 427 F.2d 1017,
 23 1018 (9th Cir. 1970) (knowledge that the property stolen belongs to
 24 the United States is not an element of 18 U.S.C. § 641); United States
 25 v. Hamilton, 456 F.2d 171, 172-173 (3d Cir. 1972) (prosecution under

26 ^{3/} Other circuits have reached the same conclusion. See United
 27 States v. Frazier, 213 F.3d 409 (7th Cir. 2000); United States v.
 28 Cook, 76 F.3d 596, 599-602 (4th Cir. 1996); United States v. Chin, 981
 F.2d 1275, 1279-1281 (D.C. Cir. 1992); United States v. Williams, 922
 F.2d 737, 738-739 (11th Cir. 1991); United States v. Carter, 854 F.2d
 1102, 1108-1109 (8th Cir. 1988).

1 White Slave Traffic Act does not require proof that defendant knew
2 person transported was a minor).

3 As these cases demonstrate, particularly in the area of
4 regulatory or public welfare statutes, such as the drug laws, courts
5 should require "only that mens rea which is necessary to separate
6 wrongful conduct from 'otherwise innocent conduct.'" Carter v. United
7 States, 120 S.Ct. 2159, 2169 (2000) (quoting United States v. X-
8 Citement Video, 513 U.S. 64, 72 (1994)). That separation of wrongful
9 from innocent conduct is accomplished by the current requirement that
10 a defendant know that he is importing or possessing some amount of
11 some controlled substance. To require proof that the defendant knew
12 exactly which illegal substance he was importing and in precisely what
13 amount would be "to invite blindness by drug dealers." United States
14 v. Chin, 981 F.2d at 1280. As Justice (then-Judge) Ginsburg aptly
15 stated in Chin, the public welfare purpose behind the drug laws
16 suggests that the statutes "impose on the drug dealer the burden of
17 inquiry and the risk of misjudgment." Id.

18 The statutes at issue here do not explicitly state that a
19 defendant's knowledge of the type and quantity of a controlled
20 substance are elements of the offenses described therein, and our
21 court of appeals has ruled that such knowledge is not required to
22 sustain a conviction. General principles of criminal law in the area
23 of public welfare statutes counsel that a scienter requirement should
24 be limited to that mens rea necessary to distinguish wrongful conduct
25 from innocent conduct. Nothing in Apprendi commands a different
26 result. Finally, the scienter requirement advocated by defendant
27 would allow drug dealers to avoid criminal responsibility by the
28 simple expedient of limiting their employees knowledge of the details

1 of their conduct, thereby thwarting Congress's purpose in specifying
2 increased penalties for possession of large quantities of dangerous
3 drugs. The Government therefore suggests that United States v. Lopez-
4 Martinez, 725 F.2d 471 (9th Cir. 1984); United States v. Ramirez-
5 Ramirez, 875 F.2d 772, 774 (9th Cir. 1989); and United States v.
6 Salazar, 5 F.3d 445 (9th Cir. 1993) remain good law and that to
7 sustain a conviction under the drug laws it need prove only that a
8 defendant knew he was importing or possessing some amount of some
9 controlled substance.

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12 C. List Of Witnesses

13 The Government will provide the defendant with a list of all
14 witnesses which it intends to call in its case-in-chief at the time
15 the Government's trial memorandum is filed, although delivery of such
16 a list is not required. See, United States v. Dischner, 960 F.2d 870
17 (9th Cir. 1992); United States v. Cutler, 806 F.2d 933, 936 (9th Cir.
18 1986); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987).
19 Defendant, however, is not entitled to the production of addresses or
20 phone numbers of possible government witnesses. See, United States
21 v. Thompson, 493 F.2d 305, 309 (9th Cir. 1997), cert. denied, 419 U.S.
22 834 (1974).

23 D. Reports of Scientific Tests and Expert Disclosure

24 The Government will comply with Rule 16(a)(1)(D) and (E) of the
25 Federal Rules of Criminal Procedure and will allow defense counsel to
26 inspect and copy or photograph, at a mutually convenient time, any
27 results or reports of any scientific tests or experiments to which the
28 defendant may be entitled under the specific provisions of these

1 rules. Due to the early stage of this proceeding, all such reports
2 may not have as of yet been generated. The government will further
3 make the required expert witness disclosures prior to the trial of
4 this action, if the government intends to rely on any expert testimony
5 at trial.

6 E. Defendant's Prior Record

7 The government will seek to introduce any prior similar bad acts,
8 pursuant to Federal Rules of Evidence 404(b) and 609. The government
9 will provide further details of any such acts at the time the
10 government's trial memorandum is filed.

11 F. Handwritten Notes of Agents

12 The Government objects to defendant's request for production of
13 any handwritten notes of agents that may exist. Prior production of
14 an agent's handwritten notes is not necessary because such notes are
15 not statements within the meaning of the Jencks act because they do
16 not comprise a substantially verbatim narrative of the defendant's
17 assertions nor have they been approved or adopted by the defendant.
18 United States v. Spencer, 618 F.2d 605, 606-607 (9th Cir. 1980; see
19 also United States v. Griffin, 659 F.2d 932, 936-938 (9th Cir. 1981),
20 cert. denied, 456 U.S. 949 (1982); United States v. Rewald, 889 F.2d
21 836 (9th Cir 1989). The Government will, however, request its agents
22 to preserve their notes in the event materiality is shown.

23 G. Statements Made By The Defendant

24 Defendant requests disclosure of any statements made by him
25 regardless of to whom made. The Government has disclosed the
26 substance of defendant's oral statements made in response to questions
27 by Government agents. The Government, however, is not required to
28 deliver oral statements, if any, made by a defendant to persons who

1 are not Government agents. Nor is the Government required to produce
2 oral statements, if any, voluntarily made by a defendant to Government
3 agents. United States v. Stoll, 726 F.2d 584 (9th Cir. 1984); United
4 States v. Hoffman, 794 F.2d 1429, 1431 (9th Cir. 1986). The
5 Government recognizes its obligation under Federal Rule of Criminal
6 Procedure 16(a)(1)(A) to disclose "that portion of any written records
7 containing the substance of any relevant oral statement made by the
8 defendant whether before or after arrest in response to interrogation
9 by any person then known to the defendant to be a Government agent."
10 Defendant misstates Rule 16(a)(1)(A) by suggesting that this statute
11 now mandates disclosure of all defendant's statements.

12 H. Exculpatory Evidence

13 The Government will comply with the requirements of Brady v.
14 Maryland, 373 U.S. 83 (1963) and disclose all evidence in its
15 possession, which may be material to the issue of defendant's guilt
16 or punishment. A defendant, however, is not entitled to all evidence
17 which might conceivably affect the credibility of the Government's
18 case. As the Ninth Circuit stated in United States v. Gardner, 611
19 F.2d 770 (9th Cir. 1908):

20 . . . [T]he prosecution does not have constitutional duty to
21 disclose every bit of information that might affect the
22 jury's decision; it need only disclose information
favorable to the defense that meets the appropriate
standard of materiality.

23 Id. at 774-75 (citations omitted). See also, United States v.
24 Sukumolachan, 610 F.2d 685, 687 (9th Cir. 1980) (Brady does not require
25 the Government to create exculpatory material that does not exist);
26 United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976) (Brady does
27 not create any pretrial discovery privileges not contained in the
28 Federal Rules of Criminal Procedure); United States v. Bryan, 868 F.2d

1 1032, 1037 (9th Cir.), cert. denied, 110 S.Ct. 167 (1989) (statements
2 are not automatically exculpatory just because they are not
3 inculpatory).

4 I. Prior Wrongful Conduct of Government Witnesses

5 The Government will comply with its obligations to disclose
6 impeachment evidence under Giglio v. United States, 405 U.S.
7 150(1972). The Government will also provide the criminal history and
8 prior material acts of misconduct, if any, of its trial witnesses as
9 mandated in Giglio. The Government also agrees to provide information
10 related to the bias, prejudice or other motivation of government trial
11 witnesses as required in Napue v. Illinois, 360 U.S. 264 (1959). In
12 addition, the Government will disclose all impeachment material, if
13 any, when it files its trial memorandum, although it is not required
14 to produce such material until after its witnesses have testified at
15 trial or at a hearing. See, United States v. Bernard, 623 F.2d 551,
16 556 (9th Cir. 1979).

17 J. Jencks Act Material

18 Production of this material is governed by 18 U.S.C. § 3500, and
19 need occur only after the witness has testified on direct examination.
20 United States v. Robertson, 15 F.3d 862, 873 (9th Cir. 1994); United
21 States v. Kerr, 981 F.2d 1050 (9th Cir. 1992). Indeed, even material
22 believed to be exculpatory and therefore subject to disclosure under
23 the Brady doctrine, if contained in a witness statement subject to the
24 Jencks Act, need not be revealed until such time as the witness
25 statement is disclosed under the Act. See United States v. Bernard,
26 623 F.2d 551, 556 (9th Cir. 1979). Further, the Government reserves
27 the right to withhold the statements of any particular witnesses it
28 deems necessary until after they testify.

1 K. Personnel Records of Government Officers Involved in
2 the Arrest and Government Examination of Law
3 Enforcement Personnel Files

4 Pursuant to United States Henthorn, 931 F.2d 29 (9th Cir. 1991)
5 and United States v. Cadet, 727 F.2d 1452 (9th Cir. 1984), the United
6 States agrees to "disclose information favorable to the defense that
7 meets the appropriate standard of materiality." United States v.
8 Cadet, 727 F.2d at 1467, 1468.

9 The Government will request a review of the personnel files of
10 all federal law enforcement individuals who will be called as
11 witnesses in this case for Brady material. The Government will
12 request that counsel for the appropriate federal law enforcement
13 agency conduct such review. See United States v. Herring, 83 F.3d
14 1120 (9th Cir. May 13, 1996); United States v. Jennings, 960 F.3d
15 1488, 1492 (9th Cir. 1992). The Government is not required to review
16 personnel files of state law enforcement witnesses, United States
17 Dominquez-Villa, 954 F.2d 562 (9th Cir. 1992).

18 Furthermore, neither federal law nor Rule 16 requires the
19 Government to produce citizen complaints and internal affair documents
20 relating to the officers involved in the present case.

21 L. Documents and Tangible Objects

22 The Government will comply with Fed. R. Crim. P. 16(a)(1)(C) by
23 allowing defendant an opportunity, upon reasonable notice, to examine,
24 copy and inspect physical evidence that is within the possession,
25 custody or control of the Government, and which is material to the
26 preparation of defendant's defense or is intended for use by the
27 Government as evidence-in-chief at trial, or was obtained from or
28 belongs to defendant.

1 M. Audiotapes

2 The Government objects to defendant's request for audiotapes.
3 Those tapes are not Jencks material. United States v. Bobadilla-
4 Lopez, 954 F.2d 519 (9th Cir. 1992). Defendant has failed to explain
5 how he is entitled to any such tapes under FRCP 16.

6 N. Grand Jury Testimony

7 The Government objects to the extent defendant requests the
8 transcripts of grand jury testimony in connection with this case.
9 Such a request is improper because defendant has not met his burden
10 of showing a particularized need for such testimony so as to overcome
11 the secrecy of grand jury proceedings. The United States Supreme
12 Court has stated there is "a long established policy that maintains
13 the secrecy of the grand jury proceedings in the federal courts."
14 United States v. Proctor & Gamble Co., 356 U.S. 677,
15 681(1958) (footnote omitted); Douglas Oil Company v. Petrol Stops
16 Northwest, 441 U.S. 211, 218(1997) The Supreme Court has also
17 consistently held that Federal Rule of Criminal Procedure
18 6(e)(3)(C)(i) requires a strong showing of particularized need before
19 grand jury materials are disclosed. See United States v. Sells
20 Engineering, Inc., 436 U.S. 418(1983). In the instant case, defendant
21 has made no showing of any particularized need but simply a broad
22 request for all grand jury information. Consequently, defendant's
23 motion should be denied. See United States v. Malquist, 791 F.2d
24 1399(9th Cir. 1986), cert.denied, 479 U.S. 954(1986).

25 O. THE GOVERNMENT'S MOTION FOR RECIPROCAL DISCOVERY
26 SHOULD BE GRANTED

27 Defendant has invoked Federal Rule of Criminal Procedure 16(a)
28 in his motion for discovery. Further, the Government has voluntarily
complied with and exceeded the requirements of Federal Rule of

1 Criminal Procedure 16(a). Thus, Rule 16(b), pertinent portions of
2 which are cited below, is applicable:

3 (b) Disclosure of the Evidence by the Defendant.

4 (1) Information Subject to Disclosure.

5 (A) Documents and Tangible Objects.

6 If the defendant requests disclosure under subdivision
7 (a)(1)(C) or (D) of this rule, upon compliance with such
8 request by the Government, the defendant, on request of the
9 Government, shall permit the Government to inspect and copy
10 or photograph books, papers, documents, photographs,
tangible objects, or copies or portions thereof, which are
within the possession, custody, or control of the defendant
and which the defendant intends to introduce as evidence-
in-chief at the trial.

11 If the defendant requests disclosure under subdivision
12 (a)(1)(C) or (D) of this rule, upon compliance with such
13 request by the Government, the defendant, on request of the
14 Government, shall permit the Government to inspect and copy
15 or photograph any results or reports of physical or mental
16 examinations and of scientific tests or experiments made in
17 connection with the particular case, or copies thereof,
within the possession or control of the defendant, which
the defendant intends to introduce as evidence-in-chief at
the trial or which were prepared by a witness whom the
defendant intends to call at the trial when the results or
reports relate to his testimony.

18 Therefore, Rule 16(b) should presently be determined to be operable
19 as to the defendant.

20 The Government, pursuant to Rule 16(b), hereby requests that the
21 defendant permit the Government to inspect, copy, and photograph any
22 and all books, papers, documents, photographs, tangible objects, which
23 are within the possession, custody or control of defendant and which
24 he intends to introduce as evidence in his case-in-chief at trial.

25 The Government further requests that it be permitted to inspect
26 and copy or photograph any results or reports of physical or mental
27 examinations or scientific tests or experiments made in connection
28 with this case, which the defendant intends to introduce as evidence
in his case-in-chief at trial. The Government also requests that the

1 court make such orders as it deems necessary under Rule 16(d)(1) and
2 (2) to ensure that the Government receives the discovery to which it
3 is entitled.

4 //

5 /

6 P. DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AS VIOLATIVE
7 OF HER MIRANDA RIGHTS SHOULD BE DENIED

8 At an evidentiary hearing, the Government would demonstrate that
9 defendant's post-Miranda statements were admissible and that they were
10 not obtained in violation of his Fifth Amendment rights or the Miranda
11 decision.

12 1. Defendant Waived Her Miranda Rights

13 The testimony would establish that the defendant was advised of
14 his Miranda rights following his arrest orally and thereafter waived
15 them. Whether there has been an intelligent Miranda waiver by the
16 defendant depends upon the particular facts in the case, including the
17 background, experience, and conduct of the accused. Brewer v.
18 Williams, 430 U.S. 387, 403 (1977). See also, United States v.
19 Rodriguez-Gastelum, 569 F.2d 482, 483 (9th Cir. 1978).

20 2. Defendant's Statements Were Voluntary

21 The Government would establish the voluntariness of defendant's
22 statements by a preponderance of the evidence. Lego v. Twomey, 404
23 U.S. 477, 488-489 (1972). A statement will be found to be voluntary
24 if the totality of the surrounding circumstances indicates that it was
25 the product of free and rational choice. Columbe v. Connecticut, 367
26 U.S. 568 (1961). The voluntariness of a Fifth Amendment waiver
27 depends "on the absence of police overreaching, not on 'free choice'
28 in any broader sense of the word." Colorado v. Connelly, 367 U.S. 568
(1986). In examining the totality of the circumstances to determine

whether the will of the defendant was overborne by coercive pressures, the court is required to examine the personal characteristics of the defendant together with the details of the interrogation. See Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

Here, the testimony would establish that defendant agreed to answer questions without an attorney present. The testimony would also establish that defendant was not subjected to any form of physical or mental threats or coercion, and the conduct of the Government agents involved was entirely proper. The defendant had his Miranda rights explained to him and then agreed to waive those rights and make a statement. The Government's conduct was entirely proper. Therefore, defendant's motion to suppress his statements should be denied.

3. Defendant Is Not Entitled To An Evidentiary Hearing

Defendant's motion to suppress statements should be denied without an evidentiary hearing. An evidentiary hearing is not required because defendant has failed to comply with the Local Rules. Specifically, defendant's moving papers do not include any supporting declarations.

Local Rule 47.1 (g) provides:

(1) When Declarations Required

Criminal motions requiring a predicate factual finding shall be supported by declaration(s). When a opposing party contests a representation of fact contained in a moving declaration, the opposition shall likewise be supported by a declaration which places that representation into dispute. When an opposing party does not contest such a representation, but argues instead that additional facts bear on the court's inquiry, the opposing party shall support its arguments with declaration(s) setting forth such additional facts. The court need not grant an evidentiary hearing where either party fails to properly support its motion or opposition. (emphasis added).

1 The Ninth Circuit has held that a district court has the power
 2 to regulate its practice in criminal cases in the manner prescribed
 3 by Local Rule 47.1. United States v. Terry, 11 F.3d 110, 113 (9th
 4 Cir. 1993). The Ninth Circuit has also upheld a district court's
 5 denial of a request for an evidentiary hearing where a defendant
 6 failed to comply with a local rule requiring the submission of
 7 supporting declarations. United States v. Wardlow, 951 F.2d 1115,
 8 1116 (9th Cir. 1991) cert. denied, 113 S.Ct. 469 (1992).

9 Defendant's motion to suppress evidence is nothing more than a
 10 boiler plate discussion of the law filled with factual and legal
 11 conclusions. Furthermore, defendant has failed to present any support
 12 for her contention that the post-Miranda consents were involuntary.
 13 Defendant's contentions that these statements were involuntarily made
 14 is made without the benefit of any declaration by the defendant to
 15 this effect and, as discussed above, should be denied without an
 16 evidentiary hearing.

17
 18 O. DEFENDANT'S MOTION TO DISMISS BECAUSE THE GRAND JURY
 19 WAS NOT PROPERLY INSTRUCTED SHOULD BE DENIED

20 Defendant urges the court to dismiss the indictment based
 21 on the Government's failure to inform the grand jury that they have
 22 the power to return a "no bill" even when there is sufficient probable
 23 cause to charge the Defendant with a crime. Defendant essentially
 24 states that the absence of a grand jury nullification instruction is
 25 grounds for dismissal of the indictment. Defendant is wrong.

26 While jury nullification (and grand jury nullification)
 27 probably does occur, it is not to be encouraged through the use of
 28 jury instructions. See United States v. Powell, 955 F.2d 1206, 1213
 (9th Cir. 1991); United States v. Dougherty, 473 F.2d 1113, 1133 (D.C.

1 Cir. 1972) (while jury nullification is a fact of our jurisprudential
2 process, anarchy would result from instructing the jury that it may
3 ignore the requirements of the law). In the Ninth Circuit, the
4 Defendant is not entitled to a jury nullification instruction at
5 trial. United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972).

6 The law that applies to jury nullification instructions can
7 and should apply to grand jury nullification instructions. Just as
8 the court has no obligation to instruct juries that they have the
9 power to acquit a Defendant at trial regardless of the evidence of his
10 guilt, the Government has no obligation to inform the grand jury that
11 they have the power to return a "no bill" even where there is probable
12 cause to return an indictment. Defendant does not cite any case
13 requiring the Government to provide the grand jury with a
14 nullification instruction, and no such case exists. Acceptance of
15 Defendant's proposal to give a grand jury nullification instruction
16 so that "individual conduct [] collides with the rules adopted by
17 Governmental processes would, of course, amount to rejection of law
18 as the controlling principle of society." United States v. Simpson,
19 460 F.2d 515, 519 (9th Cir. 1972) (further citations omitted).
20 Accordingly, Defendant's motion to dismiss the indictment based on the
21 Government's failure to give a grand jury nullification instruction
22 should be denied.

III

CONCLUSION

For the above stated reasons Defendant's Motions should be denied.

DATED: June 21, 2001

Respectfully submitted,

PATRICK K. O'TOOLE
United States Attorney



SCOTT H. SAHAM
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Crim. Case No. 01CR1579-B
Plaintiff,)
v.) CERTIFICATE OF SERVICE
AIDE CUELLAR,) BY MAIL
Defendant.)

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO) ss.

IT IS HEREBY CERTIFIED THAT:

I, Paula R. Steward, am a citizen of the United States over the age of eighteen years and a resident of San Diego County, San Diego, CA; my business address is 880 Front Street, San Diego, California; I am not a party to the above-entitled action; and,

On this date I deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage; **Government's Memorandum in Opposition to Defendant's Motions** addressed to

GERALD SINGLETON, ESQ.
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101-5008

the last known address at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 22, 2001.


PAULA R. STEWARD